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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1051

HARVEY ROSENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 13, 1972. A petition for rehearing was denied on November 29, 1972 (Pet. App. 1a-2a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 29, 1973, and on that day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury could reasonably find that, taken in context, petitioner's responses to questions put to him before a grand jury constituted perjury.

2. Whether the indictment should have been dismissed on the ground that petitioner was deprived of his Sixth Amendment right to a speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on a one-count indictment charging him with having committed perjury before a grand jury. He was sentenced to a suspended term of one year's imprisonment. The conviction was affirmed by the court of appeals without opinion.

1. In July 1964, petitioner, an attorney, had represented one Allie Romano in removal proceedings in the United States District Court for the District of Columbia following Romano's arrest in that district on a warrant issued in the Southern District of New York charging narcotics violations. In connection with this representation, petitioner had given $30,000 to a bail bondsman to effectuate Romano's release on bond. Romano subsequently failed to appear for trial in the Southern District, and the Bureau of Narcotics and Dangerous Drugs commenced an investigation to ascertain his whereabouts.

In the course of this investigation, bureau agents contacted one Muriel Block, a friend of Romano's and a former employee of petitioner. Miss Block requested that she be interviewed at the office of petitioner, who

was her attorney, and the interview took place on April 30, 1965. After completing their inquiries of Miss Block, the agents questioned petitioner concerning the source of the money used to effectuate Romano's release on bond. Petitioner informed them that he had received a telephone call from Romano's New York attorney, who said $30,000 in cash would be sent to him by messenger; that the money had arrived and he had visited Romano in the District of Columbia jail for further instructions; that Romano had instructed him to sign the receipt for the money and deliver the money to the bondsman; that he had done so and Romano had been released on bond that night; and that he had the receipt and could produce it if necessary (A. 258–265, 297–301).[1]

Petitioner was thereafter called before a grand jury in the Southern District of New York which was investigating Romano's disappearance. At the July 14, 1965, session, he was specifically asked about his conversation with the narcotics agents. At first he stated merely that he had no recollection of being asked about the money by the agents (A. 154–159; Pet. 5–6; Pet. App. 7a–10a). Under further questioning, however, he denied outright having made statements to the agents which the evidence showed he had in fact made (A. 159–162; Pet. 6–8; Pet. App. 10a–12a). The indictment (A. 5) was based upon five such denials:

> Q. Didn't you tell Agent Wurms that Markowitz, during the telephone conversation, told you that he was sending down $30,000 by

[1] "A." refers to the appendix in the court of appeals, a copy of which we are lodging with the clerk of the Court.

messenger? A. No, because that's not what happened [A. 159; Pet. 6; Pet. App. 10a].

* * * * *

Q. Did you tell the agents that you went down to the District jail to talk to Romano about a receipt for the $30,000? A. Not to my knowledge, because it never occurred——

Q. Did you tell the agents that Romano told you that you should sign the receipt for the $30,000 and give it to Senge? A. No sir, because I wouldn't be signing a receipt for $30,000 I gave away [A. 161; Pet. 7–8; Pet. App. 11a–12a].

* * * * *

Q. Did you tell the agents that you signed a receipt for the $30,000? A. No, sir.

Q. Did you tell the agents that you could produce that receipt, if it was necessary? A. No, sir; there is no such receipt [A. 162; Pet. 8; Pet. App. 12a].

2. A two-count perjury indictment was returned against petitioner on January 20, 1966 (A. 23, 32–38). Following various procedural moves initiated by the defense (A. 23–25), the government on September 6, 1966, filed a *nolle prosequi* on that indictment (A. 25). The instant one-count indictment was returned on October 27, 1966 (A. 1, 4–6). Petitioner's plea of not guilty was entered on November 21, 1966, and on January 3, 1967, he filed motions for dismissal, for discovery and inspection, for a bill of particulars, and for disclosure of any unlawful electronic eavesdropping which may have led to the indictment (A. 1, 7–12). On June 1, 1967, the motion to dismiss was denied, the motion for discovery was partially granted and partially denied, and the motion for a bill of

particulars was granted to the extent consented to by the government (A. 1).

On March 22, 1968, after the government failed to serve a bill of particulars or to make an electronic eavesdropping disclosure, petitioner moved for dismissal of the indictment and for other relief (A. 1, 195–196). Argument on the motion was adjourned by several successive stipulations (A. 2);[2] the last stipulation, filed May 13, 1969, adjourned the motion until October 1969 and provided that the case would not be placed on the trial calendar until 60 days after both service of the bill of particulars and decision on petitioner's motions (A. 2, 205).

The bill of particulars was served on July 8, 1969 (A. 206, 209) and filed 11 days later (A. 2). No further action was taken by either party for approximately a year. On August 31, 1970, the government notified petitioner's counsel by letter of its intent to move the case for trial during the fall of 1970 and inquired whether any further procedural steps were necessary prior to the commencement of trial (A. 215–216). On October 26, 1970, petitioner responded by moving for

[2] On the same day that the motion to dismiss was filed, petitioner's counsel wrote to the United States attorney confirming their understanding of that day that the motion was to be adjourned until May 6, 1968, and that the case was to be postponed from the trial calendar of March 29 to that of September 17, 1968. Counsel also advised that he was involved in another case—*United States* v. *Coffin, et al.*—which, if it came to trial, would have to take precedence (A. 238). The *Coffin* case was tried in May and June of 1968; counsel filed his appellate brief in the case at the end of November of that year and argued the appeal on January 7, 1969. See *United States* v. *Spock*, 416 F. 2d 165 (C.A. 1).

the first time to dismiss the indictment for failure to prosecute (A. 210). In an accompanying affidavit, it was represented that, due to other commitments, petitioner's counsel would not be available for trial until the fall of 1971 (A. 213); petitioner's reply affidavit to the government's opposition to his motion to dismiss asserted that "the only proper alternative" to dismissal of the indictment "would be to set the trial down for November 1971, when [counsel] will be available to try it" (A. 229).

By order dated February 8, 1971, the district court denied petitioner's motion to dismiss, but acceded to his request that a trial date be set for the fall of 1971 (A. 234; Pet. App. 4a). The court found that "much time has been wasted by both sides—by the defendant in renewing requests for substantially identical relief previously considered and disposed of; by the Government in a clear failure within a reasonable time to comply with our order of June 1, 1967" (A. 231; Pet. App. 2a–3a).[3]

On May 28, 1971, the government informed petitioner that it was ready to try the case any time after June 15 of that year; at a calendar call on June 25 the government again announced that it was ready for trial, and the court set the trial for January 24, 1972, a date to which petitioner agreed (A. 240). Petitioner, having substituted himself for his original counsel (who had withdrawn) on July 7, 1971 (A. 2), moved *pro se* on December 22 of that year for a continuance

[3] The court also noted that it was satisfied with the government's assurances that there was no wiretap or electronic surveillance in any way relating to the case (A. 232; Pet. App. 3a).

of the January 24, 1972, trial date; the motion was denied (A. 2). On January 13, 1972, petitioner—having retained new counsel—moved to dismiss the indictment on the ground that he had been denied his right to a speedy trial (A. 235). The motion was denied, and the case proceeded to trial on January 25, 1972 (A. 3).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 12–13) that the court of appeals, in affirming his conviction, "overbroadly applied" 18 U.S.C. 1621 or adopted a " 'loose construction' " or "expansive view" of the statute. The recent decision in *Bronston* v. *United States*, No. 71–1011, decided January 10, 1973, upon which petitioner relies, involved only whether one could be convicted under the perjury statute for a statement "that is literally true but not responsive to the question asked and arguably misleading by negative implication" (slip op. 1). By contrast, the sworn statements for which petitioner was indicted and convicted were neither literally true nor unresponsive; rather, they were false, not by negative implication, but by affirmative assertion. Whereas the "testimonial mishap" in *Bronston* could easily have been cured by "a single additional question by counsel alert * * * to the incongruity of petitioner's unresponsive answer" (slip op. 6–7), the questions to which petitioner responded falsely here were plain and precise, and his answers, which were responsive and complete, did not call for additional questions to cure any possible "testimonial mishap."

Petitioner contends, however, that "the indictment lifted certain of his answers out of context" and that when the entire testimony is read, it is clear that he did not deny making statements to the agents but only disclaimed recollection of any such statements (Pet. 13). He also argues (Pet. 14–15) that his "relentless" questioning before the grand jury was a "'bludgeoning'" designed only "to ensnare him in a perjury charge." It is true that, in response to a number of specific questions concerning his conversation with the BNDD agents, petitioner denied recollection of his statements. It is equally true, however, that in response to the questions recited in the indictment he flatly denied making the statements to which they referred. It was precisely because his denials of recollection were considered possibly evasive by the attorney conducting the examination that additional questions were posed in an effort to bring out the truth. As this Court observed in *Bronston* (slip op. 7), "[i]f a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." The contention that the questions and answers charged in the indictment were taken out of context was properly addressed to and resolved by the jury, which was in a position to consider the entire transcript of petitioner's grand jury testimony (see A. 450, 462) as well as his explanation of the particular answers that were the subject of the indictment (A. 354–375).

The decision below does not conflict with *Brown v. United States*, 245 F. 2d 549 (C.A. 8), upon which

petitioner relies (Pet. 14). Unlike the situation here, the questioning in that case "had no tendency to support any possible action of the grand jury within its competency" (245 F. 2d at 555), and the statements upon which the perjury charge rested were so far out of context that they appeared to have "'a meaning wholly different than that which its context clearly shows'" (*id.* at 556).

There is, moreover, no basis for petitioner's claim (Pet. 15) that the court's instructions and the prosecutor's argument "confused the jury into believing that it could convict" on the basis of the answers, not charged in the indictment, in which he merely denied recollection. While the court pointed out that a false denial of recollection is as perjurious as an unqualified "yes" or "no" which is false (A. 443), it made clear that a conviction could be based only on one or more of the five unqualified answers charged in the indictment (A. 445–446, 451–452).

Nor did the prosecutor suggest that the jury could convict on the basis of petitioner's denials of recollection. In explaining why petitioner had been asked repetitive questions before the grand jury, the prosecutor argued that the interrogator had considered the denials of recollection to be evasive and had continued to ask questions until petitioner, when he realized that counsel was "not going to buy" a failure of memory (A. 441), responded with outright false statements (A. 434–435, 441). The prosecutor also argued that, if the jurors found petitioner's denials of recollection unbelievable, they should find that the unqualified answers for which he was indicted were also

false (A. 433).[4] This was proper argument which in no way implied that the jury could convict petitioner for false statements not charged in the indictment.

2. Petitioner also contends (Pet. 16–18) that, under standards enunciated in *Barker* v. *Wingo*, 407 U.S. 514, his indictment should have been dismissed because he was denied his Sixth Amendment right to a speedy trial. As the Court stated in *Barker*, there are four factors which must be weighed in determining whether the right to a speedy trial has been denied: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" (407 U.S. at 530). Although six years elapsed between the indictment and the trial in this case, *Barker* does not require a dismissal of the indictment.

First, the government was not solely responsible for the delay. As the district court found (Pet. App. 2a–3a), both sides contributed to the delay. Moreover, all of the delay after August 31, 1970, when the government first notified petitioner of its intent to move the case to trial, was attributable to petitioner (see pp. 5–7, *supra*). The record does not reflect the reasons for that portion of the delay for which the government was responsible, but petitioner has not sug-

[4] That the prosecutor's comments could not have confused the jury is revealed by the statements made immediately following those quoted by petitioner (Pet. 15):

"If you find that the agents report is true and Rosenberg was just saying, 'I don't remember' because it is a convenient way of avoiding perjury, then you have found Harvey Rosenberg unbelievable and if you find him unbelievable when he says 'I don't remember,' how in the world can you believe him when he says 'No, I didn't discuss this with the agents'"? (A. 433.)

gested that the government intentionally delayed to gain a tactical advantage or to harass him (cf. *Barker, supra*, 407 U.S. at 531, n. 32).

Second, petitioner never asserted a right to be tried without delay. The right that he did assert, and not until the fall of 1970 after the government had indicated its readiness for trial, was to have the indictment dismissed.[5] Even that assertion was accompanied by a request for a further delay of one year in the event that dismissal was denied, and at the end of the year petitioner sought to postpone trial still further. Thus, here as in *Barker* the record "strongly indicates * * * that the defendant did not want a speedy trial" (407 U.S. at 536).

Finally, petitioner has not shown that the delay here was prejudicial to his defense. All that he can assert in that regard (Pet. 16) is that *government* witnesses—the narcotics agents—"had no substantial present recollection" of their conversation with petitioner. This may have weakened the prosecution's case, but it is difficult to see that it substantially prejudiced petitioner. Petitioner was at no time incarcerated, and no witness died or became unavailable during the pretrial period. Again as in *Barker*, any "prejudice was minimal" (407 U.S. at 534).

[5] Contrary to petitioner's assertion (Pet. 16–17), his March 22, 1968 motion to dismiss the indictment was not the "equivalent of a request for speedy trial." The motion was based on the government's failure to serve a bill of particulars and make other disclosures, not on its failure to notice the case for trial. After the bill of particulars was served, petitioner did nothing for a year; he was roused into activity only by notification that the government was ready for trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
MARSHALL TAMOR GOLDING,
Attorneys.

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